

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

KARL F. THOMPSON, JR.,
Defendant.

No. CR-09-88-FVS

ORDER RE WILLIAM LEWINSKI

THIS MATTER came before the Court on June 3, 2010, for a pretrial conference. One of the motions the Court considered was the government's motion in limine to exclude the expected testimony of defense expert William Lewinski. This order serves to memorialize the Court's oral ruling.

BACKGROUND

William Lewinski is a professor in the law enforcement program at Minnesota State University at Mankato. The defendant intends to elicit a number of opinions from him. At a minimum, they include whether a videotape is able to capture a law enforcement officer's perspective of the risk presented by a suspect; the manner in which an officer's training and experience shapes his perception of events; and the manner in which trauma influences an officer's ability to remember events. The government moves to exclude Professor Lewinski's expected testimony.

1 **QUALIFICATIONS**

2 The government argues Professor Lewinski is unqualified to render
3 the opinions the defendant intends to elicit from him.

4 *Analysis:*

5 Professor Lewinski earned a Ph.D. from the Union Institute and
6 University in Cincinnati, Ohio. As the government points out, this is
7 not a prestigious institution. However, the materials submitted by
8 the parties indicate Professor Lewinski has been active
9 professionally. He has conducted research, written articles, and
10 participated in conferences. Thus, while Professor Lewinski's formal
11 academic credentials are not the strongest, he may have established
12 himself as an expert through research, writing, and speaking.

13 **ADEQUACY OF DR. LEWINSKI'S REPORT**

14 The government complains Professor Lewinski's report does not
15 provide specific examples of how his testimony applies to the facts of
16 the case. Nor, in the government's opinion, does his report cite
17 research as authority for his opinions.

18 *Analysis:*

19 The Court assumes the government is referring to Professor
20 Lewinski's three-page report of April 15, 2010. If so, the government
21 is correct about at least one thing. The report is insufficiently
22 specific to enable the Court to determine whether Professor Lewinski's
23 testimony is admissible.

24 **RESEARCH METHODS**

25 The government cites what it characterizes as Professor
26 Lewinski's "most-recently published study" and then proceeds to

1 criticize the research methodology he employed.

2 *Analysis:*

3 Since the government did not provide a copy of the article, the
4 Court cannot evaluate the merits of the government's argument.

5 **USE OF PEER-REVIEWED RESEARCH**

6 The government cites a different article and complains that,
7 while Professor Lewinski relied upon peer-reviewed studies, the
8 studies he relied upon do not support his conclusions.

9 *Analysis:*

10 Since the government did not provide a copy of Professor
11 Lewinski's article or the studies he relied upon, the Court cannot
12 evaluate the merits of the government's argument.

13 **RULINGS BY OTHER COURTS**

14 The government argues federal courts "routinely" limit or exclude
15 Dr. Lewinski's testimony. The government cites five cases.

16 *Analysis:*

17 One of the cases the government cites is *White v. Gerardot*, 2008
18 WL 4724004 (N.D.Ind. Oct. 24, 2008). In *White*, the magistrate judge
19 said:

20 Dr. Lewinski, Defendant's expert in police psychology,
21 opines that Gerardot faced a real, imminent threat;
22 reasonably believed that he had to shoot immediately to
23 defend himself; was correct in believing that Ford was a
24 lethal threat to him; and that Gerardot focused on what he
25 believed to be important during the encounter. Plaintiff
26 seeks to exclude all of Dr. Lewinski's opinion, arguing that
Dr. Lewinski's opinion attempts to bolster Gerardot's
credibility to the jury and improperly intrude upon the
province of the jury. . . .

This Court will apply similar limitations to Dr.

1 Lewinski that it applied to Kenneth Katsaris, Plaintiff's
2 police procedure expert, for the same reasons articulated in
3 this Court's Opinion addressing Katsaris. . . . Therefore,
4 the following testimony by Dr. Lewinski will be precluded:
5 (1) any opinion that Gerardot actually identified Ford as a
6 threat; (2) any opinion that Gerardot reasonably believed he
7 had to shoot immediately to defend himself; and (3) any
8 opinion that Gerardot was correct, from an action/reaction
9 perspective, in believing that Ford was a lethal threat to
10 him. These are impermissible legal conclusions, attempt to
11 bolster Gerardot's credibility, and improperly invade the
12 province of the jury.

13 However, Dr. Lewinski may testify about what a
14 reasonable police officer would consider to be an
15 "appearance of threat" and may testify about a reasonable
16 officer's action and reaction time with a weapon under the
17 circumstances presented.

18 *Id.* at *2. In view of the foregoing, the government is correct in
19 stating the magistrate judge limited Professor Lewinski's testimony.
20 However, the limitations the judge imposed were no greater than the
21 limitations he imposed upon the plaintiff's expert.

22 **ON-LINE NEWSPAPER ARTICLE**

23 On April 28, 2010, an online newspaper named "City Pages"
24 published an article that is critical of Professor Lewinski.

25 *Analysis:*

26 The article is a combination of fact and opinion. It is not
always clear where the former ends and the latter begins. In any
event, it is impossible to assess the accuracy of the article.

USEFULNESS OF TESTIMONY

The government argues the jury does not need assistance from
Professor Lewinski. For one thing, the government submits the jury can
see, from watching the security videos, that they do not capture all

1 of the information Officer Thompson would have perceived when he
2 confronted Mr. Zehm. For another thing, the government submits the
3 jury can readily appreciate, without expert testimony, that Officer
4 Thompson interpreted Mr. Zehm's "body language" when assessing whether
5 he posed a threat. Finally, while the government acknowledges stress
6 can affect one's ability to recall an event, the government submits a
7 jury does not need an expert to inform it of that fact. For this last
8 proposition, the government places great weight upon *United States v.*
9 *Libby*, 461 F.Supp.2d 3 (D.D.C.2006). In that case, the trial judge
10 excluded expert testimony the defendant planned to offer regarding
11 limitations upon memory. The government urges the Court to do the
12 same here.

13 *Analysis:*

14 The point of expert testimony is to assist the jury. If the
15 expert's testimony will not assist the jury, it is pointless. Whether
16 the above-described testimony will assist the jury is a close call.
17 However, the types of questions the government poses with respect to
18 the utility of Professor Lewinski's testimony also may be posed with
19 respect to some of the testimony the government plans to offer. For
20 example, do jurors really need experts to tell them what the security
21 videos show? And do jurors really need experts to tell them when a
22 suspect presents a threat to the safety of an officer?

23 **CONCLUSION**

24 As of June 3, 2010, the Court lacked sufficient information to
25 enable the Court to determine whether the expected testimony of
26 Professor Lewinski is admissible.

